network. Rather, IP communications take multiple paths through many different IP networks, and they are reassembled only at the termination point (or, in the case of a communication terminating on the PSTN, at the media gateway). An IP address itself can change its geographic location without necessitating any change in the network. Circuit-switched engineering models that assume that the end points can be documented and traced through a network are technically inapplicable to IP networks.

Voice-embedded IP service providers will likely interconnect with circuit-switched facilities in a variety of different ways, and a variety of different entities will perform the protocol conversions. Some Voice-embedded IP service providers will perform the IP-to-circuit-switching protocol conversion at a media gateway, and then connect from the gateway to a LEC using business line services such as ISDN-PRI. Others may perform the IP-to-circuit-switching protocol conversion and then transmit the communication over a CLEC trunk running from the media gateway to a point of interconnection with another LEC. The Voice-embedded IP service provider may perform the protocol conversion, or it may contract the conversion out to a third party (perhaps another Voice-embedded IP service provider that may or may not be affiliated with a CLEC).

The inherent flexibility of IP communications also means that the service provider model only will be one of the models through which Voice-embedded IP communications are available. Voice-embedded IP communications also will likely evolve on a peer-to-peer basis. With peer-to-peer, the network interconnections are arranged by the peering end-users themselves, interconnecting the Internet with the PSTN in much the same manner as might occur with a "leaky PBX," except that the "leaky"

traffic would be drawn from the entire Internet. These end-users are likely to interconnect with the PSTN over ordinary business lines.

B. Unless the Commission Forbears, Voice-Embedded IP Will Suffer from Legal and Market Uncertainty Regarding IP-PSTN Intercarrier Compensation.

As the Commission acknowledges, "interconnection arrangements between carriers are currently governed by a complex system of intercarrier compensation regulations."[37] Collectively, the existing regimes are an historically derived, inconsistent and incoherent "patchwork" of rules that "treat different types of carriers and different types of service disparately, even though there may be no significant differences in the costs among carriers or services."[38] As the Commission explained, "[t]he interconnection regime that applies in a particular case depends on such factors as: whether the interconnecting party is a local carrier, an interexchange carrier, a CMRS carrier or an enhanced service provider; and whether the service is classified as local or long distance, interstate or intrastate, or basic or enhanced."[39]

Within the traditional circuit-switched universe, access charges are the form of intercarrier compensation typically charged by an originating or terminating local exchange carrier to an interconnected interexchange carrier. The level and structure of the charge can differ depending upon whether the call, when viewed on an "end-to-end"

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37 Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, 9613 (¶ 5) (20001)(hereinafter "*Intercarrier Compensation NPRM*").

38 *Id.*, 16 FCC Rcd. at 9613, 9616. (¶¶ 5, 11).

39 *Id.* at 9613 (¶ 5).

basis,[40] originates and terminates within the same state, in which case the call is subject to intrastate access charges, or originates in one state and terminates in a different state or country, in which case the call is subject to interstate access charges. The FCC regulates the rate structure and rate level for interstate access charges, while the state commission sets the rate structure and rate level for intrastate access charges. The differences can be substantial.

For example, with respect to interstate access charges, the FCC has eliminated almost everywhere the Carrier Common Line ("CCL") charge – a per minute charge to recover allocated loop costs[41] – but many states retain a state CCL charge. FCC statistics show that interstate switched access rates average $0.0066 per access minute (excluding the NECA carriers), but intrastate access charges can be as much as three to five cents per

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[40] *See, e.g.,* Memorandum Opinion and Order, *Teleconnect Company v. Bell Telephone Company of Penn.*, 10 FCC Rcd. 1626, 1629-30 (¶ 12); Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd. 1619, 1620 (¶ 9) (1992).

[41] *See* Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal Service*, 15 FCC Rcd. 12962, 12974-77 (¶ 31) (2000)(hereinafter "*CALLS Order*"); Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized State of Return for Interstate Services of Local Exchange Carriers,* 16 FCC Rcd. 19613, 19621-22, 19633-34, 19667-68 (¶¶ 15, 41, 128) (2001) (hereinafter "*MAG Order*").

minute just for local switch termination charges, CCL charges, and Transport Interconnection Charges ("TICs").[42]

In its *Intercarrier Compensation NPRM,* the Commission acknowledged that IP-PSTN communications have been viewed as exempt from access charges, at least when the IP voice provider interconnects with the PSTN using local business services pursuant to the "ESP exemption."[43] In its *1998 Report to Congress*, the Commission declined to apply interstate access charges to all "Internet telephony" but left open the possibility that it might conclude in the future that access charges should apply to what was termed "phone-to-phone" IP communications.[44]

In light of these statements, Voice-embedded IP communications, particularly IP-PSTN communications, have been originated and terminated outside the interstate and intrastate access charge regimes. Although RBOCs in interconnection negotiations have taken the position that access charges should be assessed on IP-PSTN communications,

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[42] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Trends in Telephony Service* at 1-8, Table 1.4 (August 2003) (Interstate Per-Minute Access Charges by Carrier). Examples of intrastate access rates follow: In Texas, SBC charges approximately 3.3 cents per minute in terminating CCL and end office switching charges; in Colorado, Qwest charges approximately 3.7 cents for those same elements; in South Dakota, terminating CCL, end office switching and Transport Interconnection Charge ("TIC") total 5.2 cents per minute. These intrastate access rates do not include switched transport or tandem switching charges. *See* Summary of Selected ILEC Terminating Intrastate Access Rate Elements (Sept. 1, 2003) (attached as Exhibit 7).

[43] *Intercarrier Compensation NPRM*, 16 FCC Rcd. at 9613 (¶ 6) ("[L]ong distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption.").

[44] *See 1998 Report to Congress*, 13 FCC Rcd. at 11544-45 (¶ 91). Even with respect to "phone-to-phone" IP communications, however, the Commission recognized that it "likely will face difficult and contested issues relating to the assessment of access charges on these providers. For example, it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge scheme, or intrastate." *Id.*

resolution of these disputes are often deferred with both parties reserving their respective rights. Under that relatively uncertain bargain, the *de facto* reality has been that Voice-embedded IP communications between a CLEC and an ILEC are generally exchanged under reciprocal compensation agreements pursuant to Section 251(b)(5) of the Act, except where a CLEC specifically routes that traffic over Feature Group D trunks.

At first, the Commission's hands-off approach allowed Voice-embedded IP to develop rapidly. Now, however, actions by state commissions and ILECs are threatening to impede the development of these innovative new services and applications. Level 3 and other companies, such as 8x8 and Vonage, and even SBC and Qwest, have introduced Voice-embedded IP communications products into the marketplace. In response, state commissions are seeking to regulate Voice-embedded IP as traditional common carrier telephony services, including, in some instances the application of intrastate access charges.[45] ILECs are also becoming more aggressive, resurrecting claims that they should be paid access charges for any Voice-embedded IP traffic that terminates in a PSTN local calling area different from its point of origin. As recently as November 19, 2003, for example, SBC sent a letter to interconnecting carriers unilaterally imposing access charges:

> "[C]alls routed via Voice over Internet Protocol ('VoIP') and similar IP telephony services that are handed to SBC's telephone network are subject to switched access charges where the end-user originating the call is physically located outside of the local calling area of the physical location of the called party. Accordingly, SBC also expects each carrier to appropriately route such traffic

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[45] *See, e.g., Vonage Petition for Declaratory Ruling*, WC Docket No. 03-211, at 9-11 (filed Sept. 22, 2003) (hereinafter "*Vonage Petition*"); Comments of SBC Communications Inc., *Vonage Petition*, at 4-7 (filed Oct. 27, 2003); Comments of 8X8, Inc., *Vonage Petition*, at 12-13 (filed Oct. 27, 2003).

> over Feature Group D trunks and to pay switched access charges on any such traffic that is transmitted or terminated over the SBC network."[46]

SBC asserted a right to sue Voice-embedded IP communications providers for damages and to back-bill access charges.[47]

SBC's position is not unique. For example, BellSouth's proposed interconnection agreement provides as follows:

> "[A]ny Public Switched Telephone Network interexchange telecommunications traffic, regardless of transport protocol method, where the originating and terminating points, end-to-end points, are in different LATAs, or are in the same LATA and the Parties' Switched Access Services are used for the origination or termination of the call, shall be considered Switched Access Traffic. Irrespective of transport protocol method used, a call which originates in one LATA and terminates in another LATA (i.e., the end-to-end points of the call) or in which the Parties' Switched Access Services are used for the origination or termination of the call, shall not be considered Local Traffic or ISP-bound traffic."[48]

While the language is ambiguous, one possible reading is that switched access charges apply to all Voice-embedded IP communications, including IP-PSTN communications. Similarly, Sprint proposes to treat calls that are originated and terminated by PSTN yet transmitted via the Internet in the same manner as voice traffic, even when such traffic is incidental to IP-PSTN Voice-embedded IP service.[49] And, under Verizon's interconnection agreement, "Reciprocal Compensation Traffic does not include . . . any

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46 Letter from Notices Manager, SBC, to Jennifer McMann, Level 3 Communications LLC (Nov. 19, 2003) (attached as Exhibit 2).

47 *See id.*

48 BellSouth/CLEC Agreement, Attachment 3 § 7.5.1, at 22, *available at* http://www.interconnection.bellsouth.com/become_a_clec/docs/ics_agreement.pdf (last visited Dec. 17, 2003).

49 *See* Sprint, Draft Master Interconnection, Collocation and Resale Agreement § 60.7, at 74 (rev. Oct. 27, 2003) (excerpts attached as Exhibit 8), *available at* http://www.sprintbmo.com/bizpark/localwholesale/html/documents/master_interconnection_collo_resale_102703.doc (last visited Dec. 23, 2003).

Internet Traffic," which suggests that Verizon intends to levy access charges on Voice-embedded IP communications.[50]

Likewise, comments filed with respect to Vonage's *Petition for Declaratory Ruling* indicate that ILECs across the board are taking the position that access charges must be assessed on IP-PSTN traffic when the geographic end-points of the communication lie in different ILEC local calling areas.[51] Because ILECs are raising the issue of access charges with respect to Voice-embedded IP traffic as part of interconnection agreements, state commissions around the country will face this question in short order, with the prospect that a hodge-podge of decisions will balkanize the national communications networks.[52] This, in turn, would lead to significant disparities in services offered in different jurisdictions. Contrary to the Communications Act's goal of uniform and affordable universal service, a patchwork of 51 regimes in 51 jurisdictions would compel providers to offer services only where market conditions are favorable. This dynamic is well underway. It is no coincidence that Qwest announced plans to

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50 Verizon Proposed Interconnection Agreement, Glossary § 2.80 (excerpts attached as Exhibit 9). Glossary Section 2.46 of the proposed agreement defines "Internet Traffic" as "[a]ny traffic that is transmitted to or returned from the Internet at any point during the duration of the transmission." *Id.* § 2.46.

51 *See, e.g.,* Comments of SBC Communications Inc., *Vonage Petition*, WC Docket No. 03-211, at 8 (filed Oct. 27, 2003); Comments of Verizon, *Vonage Petition*, WC Docket No. 03-211, at 2, 14 (filed Oct. 27, 2003); Comments of Montana Independent Telecommunications Systems, *Vonage Petition*, WC Docket No. 03-211, at 3-5 (filed Oct. 27, 2003); Comments of the National Exchange Carrier Association, Inc., *Vonage Petition*, WC Docket No. 03-211, at 1,4 (filed Oct. 27, 2003); *cf.* Comments of the National Association of State Utility Consumer Advocates, *Vonage Petition*, WC Docket No. 03-211, at 14-15 (filed Oct. 27, 2003).

52 In fact, this process has already started as several states are proceeding in different directions in determining how to approach voice-embedded IP. *See, e.g.,* Glenn Bischoff & Vince Vittore, States Push to Regulate Voice as Voice, TELEPHONY, Sept. 22, 2003, at 8-9.

launch an IP communications service in Minnesota soon after a federal district court concluded that the Minnesota PUC was powerless to regulate Vonage's IP communications service there.[53]

Moreover, SBC has argued to the Commission that the scope of the "ESP exemption" should be interpreted to cover only the access provided between an enhanced or information service provider and that provider's end-user customers.[54] SBC is advancing an argument, sure to be repeated before state commissions and in state and federal courts, that the FCC's statement about access charge exemption in the *Intercarrier Compensation NPRM* was wrong; according to SBC's reasoning, and contrary to the *NPRM*, "long distance calls handled by ISPs using IP telephony" are *not* "generally exempt from access charges under the enhanced service provider (ESP) exemption."[55]

To further add to the regulatory and market uncertainty, the ESP exemption allows ISPs to "purchase services from incumbent LECs under the same intrastate tariffs available to end-users."[56] In 1997, however, the FCC was more definitive, deciding "that

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53 *See* Ben Charney, Qwest to offer Internet phone service, CNET NEWS, Nov. 4, 2003 ("[T]he company is . . . compelled to take advantage of U.S. District Court Judge Michael J. Davis' decision that Minnesota can't treat VoIP providers like regular phone companies or collect regulatory fees."), *available at* http://www.news.com (last visited Dec. 23, 2003). Qwest began offering its Minnesota IP communications service earlier this month. *See* Jeff Smith, Net Phone Rules in FCC's Court, ROCKY MOUNTAIN NEWS, *available at* http://www.rockymountainnews.com (last visited Dec. 23, 2003).

54 Letter from David Hostetter, Executive Director-Federal Regulatory, SBC Communications, Inc. to Marlene H. Dortch, Secretary, FCC (Dec. 3, 2003), *filed in* WC Docket No. 02-361.

55 *Intercarrier Compensation NPRM*, 16 FCC Rcd. at 9613 (¶ 6).

56 First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End-user Common*

ISPs should not be subject to interstate access charges," and observing that "[t]he access charge system contains non-cost-based rates and inefficient rate structures."[57] The FCC further noted that, "given the evolution in ISP technologies and markets since the [FCC] first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs."[58]

Were the FCC (or a state commission, or a state or federal court) to attempt to adjudicate the applicability of access charges with respect to Voice-embedded IP communications, whether IP-PSTN or incidental PSTN-PSTN service, under existing rules, it would have to resolve a host of legal issues. The Commission would have to decide whether the ESP exemption applies to all traffic to and from ISPs, as it suggested in both the 1997 *Access Reform Order* and the 2001 *Intercarrier Compensation NPRM.* Assuming it upheld the broad scope of the ESP exemption against ILEC attack, the FCC would then have to determine how that exemption applies when ISPs interconnect with the PSTN through CLECs rather than purchasing ILEC business line services. It also would have to determine whether the particular Voice-embedded IP communications, particularly IP-PSTN communications, constitute "information services" as one federal

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Line Charges, 12 FCC Rcd. 15982, 16132 (¶ 342) (1997) (hereinafter "*Access Reform Order*").

57 *Id.* 12 FCC Rcd. at 16133 (¶ 345).

58 *Id.*

district court has already held,[59] or fall within the statutory definition of "telecommunications services," as other parties have suggested.[60]

While the Commission and, with respect to intrastate access charges, state commissions are capable of answering these legal questions over time, it is likely that any FCC or state commission decision would be appealed. As a consequence, there is unlikely to be regulatory and market certainty with respect to the applicability of access charges to IP communications for at least three to five years – especially if Commission decisions were remanded by the courts.[61]

Moreover, even if federal and state regulators eventually reach the (unlikely) conclusion that access charges should apply to Voice-embedded IP communications, there will be substantial uncertainty and litigation over how such charges would, in fact, apply. In its *1998 Report to Congress*, the Commission acknowledged that even with respect to what it termed "phone-to-phone IP telephony," it would "likely face difficult and contested issues relating to the assessment of access charges on these [phone-to-

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59 *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, Civ. No. 03-5287, 2003 U.S. Dist. LEXIS 18451, at *2 (D. Minn. Oct. 16, 2003).

60 *See, e.g.,* National Telecommunications Cooperative Association Initial Comments, *Vonage Petition*, WC Docket No. 03-211, at 2-4 (filed Oct. 27, 2003); Comments of CenturyTel, Inc., *Vonage Petition*, WC Docket No. 03-211, at 3-8 (filed Oct. 27, 2003); Comments of the People of the State of California and the California Public Utilities Commission in Opposition to Vonage Petition for a Declaratory Ruling, *Vonage Petition*, WC Docket No. 03-211, at 3-15 (filed Oct. 27, 2003); Comments of Verizon, *Vonage Petition*, WC Docket No. 03-211, at 4-12 (filed Oct. 27, 2003); Comments of Independent Telephone & Telecommunications Alliance, *Vonage Petition*, WC Docket No. 03-211, at 3-12 (filed Oct. 27, 2003).

61 By way of comparison, it took the courts almost five years to definitively uphold the FCC's TELRIC pricing standard for unbundled network elements. The FCC issued its TELRIC pricing rules on August 1, 1997, and the United States Supreme Court released its decision in *Verizon v. FCC*, 535 U.S. 467 (2002), on May 13, 2002.

phone] providers."[62] The Commission noted as an example that "it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge scheme."[63] For IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications, the practical difficulties of applying access charges will be even greater, given the lack of any geographically identifying feature with which to track the physical end-point of the communication. No party to date has suggested a meaningful mechanism for addressing these significant practical impediments to applying access charges.[64] Indeed, the Chairman and a wide variety of parties have suggested that interstate and intrastate IP communications are indistinguishable, and that therefore all IP communications should be classified as interstate for jurisdictional purposes.[65]

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62 *1998 Report to Congress*, 13 FCC Rcd. at 11545 (¶ 91).

63 *Id.*

64 Some parties have made fanciful suggestions, such as embedding GPS chips in Voice-embedded IP devices in order to preserve existing jurisdictional lines and to safeguard intrastate access flows. *See, e.g.*, Comments of the People of the State of California and the California Public Utilities Commission in Opposition to Vonage Petition, *Vonage Petition*, WC Docket No. 03-211, at 21 (filed Oct. 27, 2003). Implementing such suggestions would impose significant burdens on equipment manufacturers, even assuming, unrealistically, that all voice-capable devices could be identified. A GPS-based system is unlikely to work in any event because, for example, most Voice-embedded IP devices operate indoors, out of view of a satellite.

65 Chairman Michael K. Powell, Addressing Academic and Telecom Industry Leaders at the University of California (UCSD) (Dec. 9, 2003), *available* at http://www.fcc.gov/ commissioners/powell/mkp_speeches_2003.html ("[Voice-embedded IP] [i]s an interstate service. . . . It's more like wireless . . . or long distance . . . than it is like local phone service.") (excerpts from unofficial transcript attached as Exhibit 3); *see also, e.g., Vonage Petition*, WC Docket No. 03-211, at 27-31 (filed Sept. 22, 2003); Comments of Verizon, *Vonage Petition,* WC Docket No. 03-211, at 12-13 (filed Oct. 27, 2003); Comments of SBC Communications Inc., *Vonage Petition*, WC Docket No. 03-211, at 2, 4 (filed Oct. 27, 2003) ("Internet-based services are, without question, interstate communications by wire."); Comments of the High Tech Broadband Coalition, *Vonage Petition*, WC Docket No. 03-211, at 8-10 (filed Oct. 27, 2003);

Further adding to the legal and marketplace uncertainty – and highlighting the potential pointlessness of a minimum three to five years of litigation at the FCC, 51 state commissions, and federal and state courts over the application of access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications – the Commission is simultaneously conducting a rulemaking proceeding that has the objective of rendering obsolete the distinctions among compensation regimes for exchange access traffic, ISP-bound traffic, and other telecommunications traffic exchanged between carriers. At the time the rulemaking was launched in 2001, the Commission recognized expressly that it was "essential to re-evaluate these existing intercarrier compensation regimes [access charges for long-distance traffic and reciprocal compensation for local traffic] in light of increasing competition and new technologies, such as the Internet and Internet-based services, and commercial mobile radio services."[66] The Commission stated that it was "particularly interested in identifying a unified approach to intercarrier compensation – one that would apply to interconnection arrangements between all types of carriers interconnecting with the local telephone network, and to all types of traffic passing over the local telephone network."[67] In that NPRM, the Commission sought comment on a unified "bill-and-keep" mechanism for intercarrier compensation, as well as a "calling-party-network-pays" regime in which the calling party's network compensates the terminating carrier.[68]

Comments of 8x8, Inc., *Vonage Petition*, WC Docket No. 03-211, at 13-15 (filed Oct. 27, 2003).

66 *Intercarrier Compensation NPRM,* 16 FCC Rcd. at 9612 (¶ 2).

67 *Id.*

68 *See id.* at 9624-53 (¶¶ 37-120).

Even if the Commission were to take as long as another two years to complete this rulemaking and adopt a unified intercarrier compensation mechanism (sufficient time for two further notices of proposed rulemaking), it would still likely reach a unified intercarrier compensation regime long before the conclusion of litigation about the applicability of access charges to IP-PSTN Voice-embedded communications and incidental PSTN-PSTN communications.

C. Congress Established Reciprocal Compensation as the Long-Term Mechanism for Intercarrier Compensation, While Permitting a Temporary Continuation of Interstate and Intrastate Access Charges.

Section 251 of the Act, which covers LECs' interconnection obligations, takes a two-layered approach to intercarrier compensation arrangements. First, Section 251(b)(5) establishes a default compensation system that obligates all LECs (competitive and incumbent) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications" with other telecommunications carriers.[69] As the Commission recognized in its *ISP-Bound Traffic Order*, this section alone "would require reciprocal compensation for transport and termination of *all* telecommunications traffic," without exception.[70]

Second, as the Commission explained in the same order, Section 251(g) "explicitly exempts certain telecommunications services from the reciprocal compensation obligations" of Section 251(b)(5).[71] Section 251(g) states:

> On or after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access and exchange service for such

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69 47 U.S.C. § 251(b)(5).

70 *ISP-Bound Traffic Order*, 16 FCC Rcd. at 9166 (¶ 32) (emphasis in original).

71 *Id.*

> access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.[72]

As the Commission has concluded, "Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g)."[73] This specifically includes the authority to set interstate access rates.[74] The Commission has also, in *dicta*, stated that Section 251(g) implies a parallel exemption from Section 251(b)(5) for intrastate access charges.[75] As discussed further below, however, the plain text of Section 251(g) clarifies that these express and implied exemptions from Section 251(b)(5) for interstate and intrastate access traffic are temporary, and that the FCC can supercede them.[76]

The Commission's reciprocal compensation regulations, contained in Part 51, Subpart H, reflect this statutory structure.[77] In keeping with Section 251(b)(5), Commission Rule 51.703(a) requires "[e]ach LEC [to] establish reciprocal compensation arrangements for transport and termination of telecommunications traffic."[78] Consistent with the construction of Section 251(g) outlined in the *ISP-Bound Traffic Order*, however, Rule 51.701(b) defines "telecommunications traffic" to exclude

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72 47 U.S.C. § 251(g).

73 *ISP-Bound Traffic Order*, 16 FCC Rcd. at 9169 (¶ 39).

74 *See id.*, 16 FCC Rcd. at 9167 (¶ 36 & n.63).

75 *See id.* at 9168 (¶ 37 n.66).

76 47 U.S.C. § 251(g).

77 47 C.F.R. Part 51, Subpart H.

78 47 C.F.R. § 51.703(a).

"telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131 [the *ISP-Bound Traffic Order*], paragraphs 34, 36, 39, 42-43)."[79]

As noted, Congress made Section 251(g)'s exemption of interstate and intrastate access charges from the scope of Section 251(b)(5) temporary. The Commission has recognized that Section 251(g) preserves access charge regulations only "unless and until the Commission . . . should determine otherwise."[80] As the D.C. Circuit noted, "that section is worded simply as a trasitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act."[81] Thus, the preexisting compensation arrangements – whether established by "court order, consent decree, or regulation, order or policy of the Commission" – remain in effect under Section 251(g) only until the Commission elects "explicitly [to] supercede[]" them.[82]

This logical interpretation of Section 251(b)(5) and 251(g) has been embraced by incumbent LECs. In comments submitted in response to the Commission's *Intercarrier Compensation NPRM,* BellSouth observed that "Section 251(g) . . . contains no jurisdictional qualification or limitation on the scope of access services subject to that section . . . ."[83] Qwest recognized that Section 251(g) "grandfathers" certain classes out

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79 47 C.F.R. § 51.701(b)(1).

80 *ISP-Bound Traffic Order,* 16 FCC Rcd. at 9169 (¶ 39); s*ee also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, 407 (¶ 47) (1999).

81 *WorldCom*, 288 F.3d at 430.

82 47 U.S.C. § 251(g).

83 Comments of BellSouth, *Intercarrier Compensation NPRM*, CC Docket No. 01-92, at 27, (¶ 61) (filed Aug. 21, 2001). BellSouth also asserted that Section 251(g)

of the reciprocal compensation requirement of Section 251(b)(5), but also that Section 251(g) authorizes the Commission to implement new rules for the 251(g) traffic. Thus, Qwest reasoned, "[o]ver time, as the FCC exercises its authority to 'supersede[] by regulation[]' *the grandfathering provisions of section 251(g), the class of traffic subject to* section 251(b)(5) may increase in size."[84] Similarly, after engaging in a comparable statutory analysis, SBC reached the "logical conclusion" that "the Commission has authority under Section 251(b)(5) and 251(g)" to implement new compensation requirements "for interstate and intrastate traffic."[85]

III. FORBEARANCE FROM 47 U.S.C. § 251(g), RULE 51.701(b)(1) AND, WHERE APPLICABLE, RULE 69.5(b) IS REQUIRED UNDER SECTION 10(a).

As Chairman Powell recognized in a recent speech, Voice-embedded IP communications are not just another form of Plain Old Telephone Service: "Stop thinking of voice as the telephone. It's just an application running on an IP network."[86]

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created an independent grant of statutory authority. That assertion is questionable following *WorldCom v. FCC*, 298 F.3d at 430.

[84] Comments of Qwest Communications International, Inc., *Intercarrier Compensation NPRM*, CC Docket No. 01-92, at 41 (filed Aug. 21, 2001).

[85] Comments of SBC Communications Inc., *Intercarrier Compensation NPRM*, CC Docket No. 01-92, at 39 (filed Aug. 21, 2001); *see also* Reply Comments of SBC Communications Inc., *Intercarrier Compensation NPRM*, CC Docket No. 01-92, at 26-27 (filed Nov. 5, 2001) ("As the Commission recently concluded in the *ISP Intercarrier Compensation Order*, Section 251(b)(5) applies on its face to the transport and termination of *all* telecommunications traffic without exception. To the extent Section 251(g) exempts certain categories of telecommunications services from automatic application of the reciprocal compensation obligations of Section 251(b)(5), it merely gives the Commission flexibility to transition from existing access regimes to a new regulatory regime . . . .") (internal footnotes omitted).

[86] Chairman Michael K. Powell, Addressing Academic and Telecom Industry Leaders at the University of California (UCSD) (Dec. 9, 2003), *available at*

He also correctly observed that, with respect to existing regulatory models, "[i]t's over; you can pretend it's not, you can fight these fights, but it is over."[87]

Fortunately, when Congress enacted the Telecommunications Act of 1996, it recognized that the terms of the Act itself, as well as the Commission's rules implementing the Act, could impede the goals of lower prices, higher quality, and rapid innovation. Congress empowered (and, in fact, required) the Commission to "forbear" from enforcing any regulation or statutory provision that would hamper the achievement of those goals, and it set forth a three-pronged test for forbearance.[88] The Commission has recognized that its forbearance obligation is an "integral part" of the Act's 'pro-competitive, de-regulatory' framework designed to "make available to all Americans advanced telecommunications and information technologies and services 'by opening all telecommunications markets to competition.'"[89]

Section 10 of the Communications Act *requires* the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or to a class of telecommunications carriers or services, if

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http://www.fcc.gov/ commissioners/powell/mkp_speeches_2003.html (excerpts from unofficial transcript attached as Exhibit 3).

87 *Id.*

88 47 U.S.C. § 160; *see also Cellular Telecoms. & Internet Ass'n* v. *FCC*, 330 F.3d 502, 504-05 (D.C. Cir. 2003).

89 Order, *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, 17 FCC Rcd. 24319, 24321 (¶ 6)(2002) (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)).

the Commission determines that three conditions have been satisfied.[90] Specifically, the obligation to forbear arises when (1) enforcing the regulation or provision in question is not necessary to ensure that the charges and practices of carriers "are just and reasonable and not unjustly or unreasonably discriminatory;" (2) enforcing the regulation or provision "is not necessary for the protection of consumers;" and (3) forbearance from enforcing the regulation or provision is "consistent with the public interest."[91] With respect to this last factor – whether forbearance is consistent with the public interest – Section 10(b) directs the Commission to consider the impact of forbearance on competitive market conditions, including the extent to which forbearance "will enhance competition among providers of telecommunications services."[92]

Pursuant to its duty under Section 10(a), the Commission must forbear from *enforcing* Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) to the extent that they impose interstate or intrastate switched access charges on IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications. First, forbearance is consistent with the public interest and will promote competition. A decision to forbear would reduce regulatory uncertainty regarding Voice-embedded IP service and eliminate much of the associated cost that the uncertainty would otherwise breed. Additionally, forbearing from enforcement would spur innovation, increase end-user efficiencies, and boost the preeminence of U.S. enterprises in this rapidly emerging field.

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90 *See* 47 U.S.C. § 160(a). Section 10(c) authorizes any telecommunication carrier to submit a petition to the Commission requesting that it exercise its forbearance authority. *See* 47 U.S.C. § 160(c).

91 47 U.S.C. § 160(a)(1)-(3).

92 47 U.S.C. § 160(b).

Second, enforcing Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) is not necessary to ensure that the "charges" and "practices" for the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications are just, reasonable, and not unreasonably discriminatory. In the absence of these provisions, the exchange of IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications will simply be governed by Section 251(b)(5), which will ensure that charges and practices are just, reasonable and nondiscriminatory through the statutorily prescribed processes to establish the terms and conditions of interconnection among carriers.

Third, enforcement of this rule and statutory provision is not necessary for the protection of consumers. Most fundamentally, access charges for Voice-embedded IP-PSTN and incidental PSTN-PSTN IP communications service cannot be "necessary" to achieve the consumer protection objective of universal service because the Act itself authorizes (and, in the case of interstate support, prescribes) the use of explicit universal service support to ensure affordable and reasonably comparable end-user rates in lieu of implicit subsidies buried in access charges. In any event, the best way to address the pressures that Voice-embedded IP communications would place on the outmoded access charge regime is to reform entirely intercarrier compensation on circuit-switched networks, as the Commission has proposed to do. IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications are unlikely to grow to such a significant extent over the next three to five years that substitution of IP-PSTN traffic for wholly-circuit switched traffic will fundamentally upset ILEC finances and certainly not to an extent that the delivery of universal service will be endangered.

A. Forbearance from Extending Interstate and Intrastate Access Charges to IP-PSTN and Incidental PSTN-PSTN Voice-Embedded IP Communications Serves the Public Interest.

First and foremost, pursuant to Section 10(a)(3), the Commission must consider whether forbearance from enforcing the regulation or provision is "consistent with the public interest."[93] The Act provides that this condition can be satisfied if the Commission concludes that forbearance "will promote competition among providers of telecommunications services."[94] Likewise, the Commission has reasoned that forbearance is appropriate if it is likely to result in increased competition and innovation.[95]

Forbearing from the application of switched access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications, and making a clear statement that the exchange of such traffic will be governed by Section 251(b)(5), will boost competition and the introduction of innovative new services in a number of ways. Specifically, forbearing from enforcement would reduce regulatory uncertainty and associated costs. It will increase investment in advanced services specifically and in the telecommunications sector generally. This will promote innovation, lead to greater efficiencies for customers, preserve U.S. preeminence in the field of Internet and telecommunications applications, and spur job growth throughout the U.S.

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93 47 U.S.C. § 160(a)(3).

94 47 U.S.C. § 160(b).

95 If enforcement of the provision would "impede[] [the petitioner] from quickly introducing new services in response to customer demands and opportunities created by technological developments" or if it would "diminish[] [the petitioner]'s ability to reduce prices and improve service in response to competitive pressures," then the third criterion is satisfied. Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunication Services*, 17 FCC Rcd. 27000, 27014-15 (¶ 26) (2002).

1. Forbearance would reduce regulatory uncertainty and avoid unnecessary costs during a transition to a uniform intercarrier compensation regime.

In general, interconnected LECs are not collecting interstate or intrastate access charges from telecommunications carriers serving IP-PSTN voice-embedded IP communications providers at present. In the absence of grant of this petition, however, individual LECs will accelerate their renewed efforts to levy and collect access charges on IP-PSTN communications that they exchange with other carriers within the same LATA – or even block such traffic. Regardless of whether the FCC ultimately concludes that IP-PSTN traffic is wholly interstate, or contains a separable mix of interstate and intrastate traffic, disputes over whether access charges should apply to IP-PSTN traffic will arise in interconnection arbitrations around the country beginning as early as the spring of 2004. That would mean re-litigating the question of whether this traffic is exchanged under access arrangements or reciprocal compensation agreements in 51 separate jurisdictions, subject to review in an equal number of federal district courts. This would truly be a "cauldron[] of regulatory hell"[96] that would inevitably slow and distort the development and implementation of IP-PSTN voice-embedded IP communications.

Moreover, as discussed in Section II.B, *supra*, the Commission, state commissions, and the courts would not only face the question of whether access charges or reciprocal compensation arrangements would apply. If access charges apply, the Commission, state commissions, and the courts would also have to determine how such

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[96] Chairman Michael K. Powell, Addressing Academic and Telecom Industry Leaders at the University of California (UCSD) (Dec. 9, 2003), *available at* http://www.fcc.gov/ commissioners/powell/mkp_speeches_2003.html (excerpts from unofficial transcript attached as Exhibit 3).

arrangements would be implemented. Would ILECs, for example, have the right to insist that interconnecting carriers purchase Feature Group D trunks in addition to local interconnection trunks, even when traffic volumes would not justify separate facilities? Would virtual foreign exchange IP-PSTN communications be subject to access charges or reciprocal compensation? Would ILECs be permitted to require Voice-embedded IP communications providers to engineer their networks, equipment and systems in a manner that allows regulators to track origination and termination locations for IP services, or pay access rates by default? Litigating these details before each and every state commission, the FCC, and the courts would add further substantial litigation costs and regulatory uncertainty.

Apart from the unnecessary costs that piecemeal, state-by-state litigation of access charge issues would impose, a more fundamental consideration supports forbearance. To apply access charges to IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications traffic *now* means applying access charges during the transition to a uniform intercarrier compensation regime, only to remove those charges as part of that transition.[97] That simply makes no sense. Applying access charges to these Voice-embedded IP communications only will serve to enhance ILECs' reliance on perpetuating the existing broken patchwork of intercarrier compensation mechanisms, rather than making the evolution to a unified regime. The best approach, consistent with the Commission's objective of achieving a uniform intercarrier compensation regime, is to allow IP-PSTN Voice-embedded IP communications to operate on a rationalized, "minute-is-a-minute" basis, with all traffic exchanged under Section 251(b)(5)'s

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97 *See, e.g., Intercarrier Compensation NPRM*, 16 FCC Rcd. 9610.

reciprocal compensation rules. As Voice-embedded IP grows, the base of traffic subject to a rationalized compensation mechanism also will grow. This evolutionary path will increase the incentive for all participants in the legacy circuit-switched access charge regime to work toward a rapid transition to a uniform intercarrier compensation mechanism.

Furthermore, the administrative cost of implementing two massive changes (a piecemeal conversion to an access charge regime and, later, a wholesale conversion to a unified intercarrier compensation regime) would be vast for the Commission, state regulators, ILECs, and providers of Voice-embedded IP communications services. Changes would have to be made to existing network architecture, such as ordering Feature Group D trunks in addition to local interconnection trunks. Billing systems and the equipment would have to be developed. Voice-embedded IP communications providers would face the challenge of attempting to determine the end points of communications for which there is no network-provided geographic end-point information. Such expenses would represent pure deadweight loss when the Commission moves to a uniform intercarrier compensation mechanism in the future. Because enforcement would lead to such unnecessary uncertainty and expense, the Commission should conclude that forbearance is in line with the public interest.

2. Forbearance would promote innovation.

Additionally, forbearing from enforcement of Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) would prompt more widespread innovation for the benefit of consumers. Because Voice-embedded IP providers and Voice-embedded IP application developers would know the precise scope

of the single compensation regime covering all of their traffic, their business risks would be reduced. Absent forbearance, they would be forced to rely on inefficient business models and network architectures capable of supporting the patchwork of existing regimes – reciprocal compensation, interstate access, or intrastate access.

If the cost of regulatory uncertainty is eliminated, investment would increase, and providers and application developers would be able to devote more resources to the development of more innovative products to throw into the competitive mix. Moreover, when crafting new products and services, providers and application developers would not have to include mechanisms designed to apply the outdated and obsolete access charge regime to technologies that are not inherently capable of jurisdictional separation.

The innovations on the horizon are truly extraordinary. As explained in Section II.A, *supra,* new Voice-embedded IP applications will blaze a trail in an entirely new direction, as an increasing number of IP devices are used to communicate both with other IP devices and with legacy PSTN devices. These devices will integrate voice with data applications; they will provide advanced functionalities that are only available in crude form on the circuit-switched network. Forbearance would speed the development of these new products and pave the way for other, as yet undreamed applications.

Furthermore, Voice-embedded IP communications show promise as a "killer app" to drive broadband penetration. At present, a major impediment to even greater increases in broadband penetration is consumers' perception that broadband lacks significant value.[98] As Chairman Powell has recognized, however, Voice-embedded IP applications

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[98] *See, e.g.,* Nat'l Telecomm. Coop. Ass'n, 2003 Internet/Broadband Availability Survey Report at 7 (May 2003) available at http://www.ntca.org/content_documents/ACF36B6.pdf.

can greatly enhance the consumer value of broadband service.[99] Driving up broadband penetration will stimulate further innovation, both in Voice-embedded IP communication and in other uses for "always-on" broadband connections. The Commission can ensure that legacy access charge rules do not impede this additional broadband penetration and innovation by granting the forbearance requested herein.

3. Forbearance would create greater efficiencies and versatility for end-users.

By forbearing, the Commission would also establish a framework that would put the widest possible array of applications in the hands of consumers. Because a uniform reciprocal compensation regime for IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications would lead to the quicker development of innovative applications, consumers will benefit.

As described in Section II.A, *supra*, valuable IP-IP and IP-PSTN applications are beginning to blossom under the *de facto* exemption from access charges that exists today. Users can already use Voice-embedded IP technology for efficient tele-working arrangements in which the users set the precise parameters of their connection to the network. On the enterprise front, Voice-embedded IP also allows for comprehensive, real-time multimedia conferencing, for data-enriched call support centers, and for simplified office or employee relocations. For all users, IP communications are leading to comprehensive unified messaging services, expanded call waiting service, availability awareness service, and location scheduling capacity. These existing products already

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[99] *See, e.g.*, Letter from Chairman Michael K. Powell to Senator Ron Wyden (Nov. 5, 2003) (expressing "excitement about the potential for VoIP technology" to bring the benefits of broadband to consumers and businesses) (attached as Exhibit 10).